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11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 **JAHIR ALBERTO ROJAS,**

16 Plaintiff,

17 v.

18 **R. LOZA, Correctional Officer, R. SINGH,**
19 **Correctional Officer, D. SANDOVAL, Correctional**
Officer,

20 Defendants.

C 07-4662 MMC

**DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION
TO MOTION TO DISMISS**

21
22 **INTRODUCTION**

23 On July 25, 2008, Defendants R. Loza, R. Singh, and D. Sandoval (Defendants) filed a
24 Motion to Dismiss. (Court Docket (CD) No. 14.) In their motion, Defendants moved to dismiss
25 Plaintiff's action under the non-enumerated portion of Rule 12(b) due to Plaintiff's failure to
26 exhaust his administrative remedies before filing suit as required under the Prison Litigation
27 Reform Act (PLRA). 42 U.S.C. § 1997e(a). Defendants also moved for qualified immunity.
28 (*Id.*) On August 25, 2008, Plaintiff filed an Opposition to Defendants' Motion to Dismiss. (CD
Def.'s Reply to Plaintiff's Opp. to Mot. To Dismiss

Rojas v. Loza, et al.
C 07-4662 MMC

1 No. 19.)

2 **ARGUMENT**

3 **A. Plaintiff's Claim That He Timely Filed His Appeal Is Not Supported by the**
 4 **Evidence.**

5 Defendant asserts that Plaintiff failed to file his appeal, institutional log number SVSP-D-
 6 07-01389 timely, over forty-four days after the incident, and therefore failed to exhaust his
 7 administrative remedies as required under PLRA. 42 U.S.C. § 1997e(a).

8 In Plaintiff's opposition, he claims that he submitted the appeal, institutional log number
 9 SVSP-D-07-01389, on February 28, 2007, and sixteen-days after the February 12, 2007 incident.
 10 (See Plaintiff's Opp., CD No. 19, at 11.) Defendants contend that he filed his untimely appeal on
 11 March 28, 2007 and well beyond the fifteen-day deadline and failed to properly exhaust his
 12 administrative remedies. First, in Plaintiff's Exhibit B. (See Defendants' Mot. to Dismiss, CD
 13 No. 14, at 7:4-16.) Defendant's contentions are supported by the Plaintiff's Exhibit B that shows
 14 on the Inmate Appeals Tracking System that institutional log number SVSP-D-07-01389 was
 15 received on March 28, 2007. (See Plaintiff's Opp., CD No. 19., Ex. B.) It is also supported by
 16 Defendants' submission of Plaintiff's appeal, institutional log number SVSP-D-01389, that
 17 shows the stamped received date of March 28, 2007. (See Medina Decl., CD 15, Ex. B.) The
 18 evidence by both Plaintiff and Defendants supports the conclusion that Plaintiff's appeal was
 19 submitted beyond the fifteen-day deadline.

20 The Court may look beyond the pleadings and decide disputed issues of fact when ruling on
 21 Defendant's non-enumerated Rule 12(b) motion for failure to exhaust administrative remedies.
 22 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). In *Woodford v. Ngo*, the Supreme
 23 Court held that the PLRA's exhaustion requirement requires the "proper exhaustion" of
 24 administrative remedies. *Woodford*, 548 U.S. 81, (2006). "Proper exhaustion demands
 25 compliance with an agency's deadlines and other critical procedural rules because no
 26 adjudicative system can function effectively without imposing some orderly structure on the
 27 course of its proceedings." *Id.*

28 As such, Plaintiff's argument that he met the required deadline and exhausted his

1 administrative remedies when the prison officials screened out his appeal for untimeliness is
2 contrary to facts in this case and the controlling case law. *See Woodford*, 548 U.S. 81.

3
4 **CONCLUSION**

5 Defendants respectfully requests that the Court dismiss this action since Plaintiff failed to
6 exhaust his available administrative remedies through the requisite third level, and requests
7 qualified immunity for Defendants' actions.

8 Dated: September 2, 2008


9 Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Rojas v. Loza, et al.**

No.: **C 07-4662 MMC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 8, 2008, I served the attached

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Jahir Alberto Rojas, P-58734
California State Prison - Corcoran
P. O. Box 8800
Corcoran, CA 93212
Pro Per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 8, 2008, at San Francisco, California.

T. Oakes

Declarant

/s/ T. Oakes

Signature